Public Prosecutor v Mohd Nazrul bin Shuhaimi

HIGH COURT (TEMERLOH) — CRIMINAL TRIAL NO 45–1 OF 2007
AKHTAR TAHIR JC
20 AUGUST 2009

Criminal Law — Penal Code — s 302 — Murder — Circumstantial evidence — Whether circumstantial evidence established intention to cause death — Whether irresistible inference could be drawn that accused committed murder

Evidence — Witness — Failure to call chemist — Whether adverse inference could be invoked against prosecution — Evidence Act 1950 s 114(g)

On the afternoon of 2 September 2006, while Noraini ('the deceased') and one Muzalifah bt Khamis ('Muz') were returning home by motorcycle, after a swim in the river, they saw the accused travelling on the road in another motorcycle. The accused chased the motorcycle that the deceased and Muz were riding on and caused them both to fall out of their motorcycle. He then confronted the deceased and Muz and an argument broke out among them about the relationship that the accused was having with both the deceased and Muz. According to Muz the accused then pulled out a knife and threatened to kill both the deceased and Muz. The deceased and Muz then started running with the accused chasing after them. The last Muz saw of the incident before she ran for cover was the accused pouncing on the deceased from the back. When Muz later came out from hiding she saw the deceased lying sprawled on the road bleeding and almost lifeless. The deceased was taken to the hospital where she died. The doctor who conducted the post mortem on the deceased detected 18 injuries on the deceased but confirmed that the two stab wounds on her neck were the cause of her death. The knife and items of clothing of the accused were sent to a chemist for analysis. The accused was charged under s 302 of the Penal Code ('Code') with the murder of the deceased. At the trial, the prosecution did not call the chemist who carried out the analysis on the knife, which was the alleged murder weapon and the accused's items of clothing, to testify. It was also found that the chemist report was not served on the accused. The main issue to be determined was whether there was sufficient evidence to draw an inference that the accused had murdered the deceased.

Held, discharging and acquitting the accused of the charge against him:

(1) To constitute murder under s 300 of the Code it was necessary to prove that there was an intention or knowledge that the act will lead to the death. In order to determine such an intention or knowledge there must be some evidence to show how the act leading to the death took place. However, in the present case the direct evidence as to how the act took place ends when Muz went into hiding as there were no other witnesses to shed light on how the actual incident which led to the 18 injuries on the deceased occurred. As such there was a total absence of evidence as to how the act took place and whether it was the accused who actually committed the act. Further, an evaluation of the circumstantial evidence does not lead to the irresistible conclusion that it was the accused who murdered the deceased (see paras 14 & 18).

(2) Although there was the evidence of the investigative officer ('the IO') that a knife was recovered, no further evidence was led to establish whether this was the murder weapon. The photographs showed that the knife was hidden under the sand but there was no evidence as to why the police dug that particular spot to recover the knife. As such the murder weapon was not tendered as evidence and this further weakened the prosecution's case (see para 20).

(3) In the circumstances of the case where the prosecution was relying on circumstantial evidence the chemist would be a material witness. As such, the prosecution's failure to call the chemist to testify caused an adverse inference under s 114(g) of the Evidence Act 1950 to be invoked against the prosecution. Although the prosecution attempted to produce the chemist report evidence through the IO, this was disallowed because the prosecution had failed to prove that the chemist report was served on the accused as is required under s 399 of the Criminal Procedure Code (see paras 10, 11 & 23).

(4) The final flaw in the prosecution case was its failure to call the witness who identified the deceased to the doctor who conducted the postmortem, ie the deceased's father. As such the identity of the deceased, the murder victim, had not been established in this case. Thus the prosecution had failed to prove a prima facie case against the accused (see para 24, 26 & 27).

[Bahasa Malaysia summary

Pada tengahari 2 September 2006, semasa Noraini ('si mati') dan Muzalifah bt Khamis ('Muz') pulang ke rumah dengan menunggang motosikal, selepas berenang di sungai, mereka nampak tertuduh menunggang motosikal lain di jalan. Tertuduh mengejar motosikal yang ditunggangi si mati dan Muz dan

menyebabkan mereka terjatuh daripada motosikal. Dia kemudiannya berdepan dengan si mati dan Muz dan satu pertengkaran berlaku di antara mereka mengenai hubungan tertuduh dengan si mati dan Muz. Menurut Muz tertuduh kemudiannya mengeluarkan pisau dan mengugut untuk membunuh si mati dan Muz. Si mati dan Muz kemudiannya berlari apabila tertuduh mengejar mereka. Kali terakhir sebelum Muz menyembunyikan diri dia nampak tertuduh menerkam ke arah si mati daripada belakang. Apabila Muz kemudiannya keluar daripada tempat penyembunyiannya dia ternampak si mati yang berdarah terbaring di atas jalan dalam keadaan nyawa-nyawa ikan. Si mati dibawa ke hospital di mana dia meninggal dunia. Doktor yang menjalankan post mortem ke atas si mati mengesan 18 kecederaan ke atas si mati tetapi mengesahkan bahawa dua luka tikaman ke atas lehernya yang menyebabkan kematiannya. Pisau dan pakaian tertuduh dihantar ke ahli kimia untuk dianalisa. Tertuduh dituduh di bawah s 302 Kanun Keseksaan kerana membunuh si mati. Pada waktu perbicaraan, pihak pendakwaan tidak memanggil ahli kimia yang menjalankan analisa ke atas pisau yang dikatakan senjata yang digunakan untuk membunuh dan pakaian, untuk memberi keterangan. Didapati bahawa laporan ahli kimia tidak diberikan kepada tertuduh. Isu utama yang perlu ditentukan ialah sama ada terdapat keterangan yang mencukupi untuk membuat satu inferens bahawa tertuduh telah membunuh si mati.

Diputuskan, melepaskan dan membebaskan tertuduh daripada tuduhan terhadapnya:

(1) Untuk membuktikan pembunuhan di bawah s 300 Kanun Keseksaan adalah penting untuk membuktikan bahawa terdapat niat atau pengetahuan bahawa tindakan tersebut akan menyebabkan kematian. Untuk menentukan adanya niat atau pengetahuan, perlu ada keterangan yang menunjukkan bagaimana tindakan tersebut boleh menyebabkan kematian. Walau bagaimanapun, dalam kes ini keterangan langsung mengenai bagaimana tindakan yang dilakukan berakhir apabila Muz menyembunyikan diri memandangkan tidak terdapat saksi-saksi lain yang boleh menyatakan bagaimana insiden sebenar yang membawa kepada 18 kecederaan ke atas si mati berlaku. Oleh itu terdapat ketiadaan keterangan yang menunjukkan bagaimana perkara tersebut berlaku dan sama ada tertuduh yang melakukan perkara tersebut. Selanjutnya, penilaian keterangan sekeliling tidak membawa kepada kesimpulan yang tidak dapat disangkal bahawa tertuduh yang membunuh si mati (lihat perenggan 14 & 18).

(2) Walaupun terdapat keterangan pegawai siasatan ('IO') bahawa pisau tersebut ditemui, tidak terdapat keterangan lanjut untuk membuktikan sama ada ia merupakan senjata pembunuhan. Foto-foto menunjukkan

bahawa pisau tersebut disembunyikan di dalam tanah tetapi tiada keterangan mengapa polis menggali tempat tersebut untuk mendapatkan pisau tersebut. Oleh itu senjata pembunuhan tidak ditender sebagai bukti dan ini selanjutnya melemahkan kes pihak pendakwaan (lihat perenggan 20).

(3) Dalam kes ini, pihak pendakwaan bergantung kepada keterangan sekeliling yang mana ahli kimia boleh menjadi saksi material. Oleh itu, kegagalan pihak pendakwaan untuk memanggil ahli kimia untuk memberi keterangan menyebabkan inferens yang menentang di bawah s 114(g) Akta Keterangan 1950 untuk digunakan terhadap pihak pendakwaan. Walaupun pihak pendakwaan cuba untuk mengemukakan laporan kimia melalui IO, ia tidak dibenarkan kerana pihak pendakwaan gagal untuk membuktikan bahawa laporan kimia diserahkan kepada tertuduh sepertimana yang diperlukan di bawah s 399 Kanun Prosedur Jenayah (lihat perenggan 10, 11 & 23).

(4) Kecacatan terakhir dalam kes pihak pendakwaan ialah kegagalan untuk memanggil saksi yang mengenalpasti si mati kepada doktor yang menjalankan post mortem, iaitu, ayah si mati. Oleh itu, identiti si mati, mangsa pembunuhan, tidak dibuktikan dalam kes ini. Oleh itu pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh (lihat perenggan 24, 26 & 27).]

Notes

For cases on failure to call chemist, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2743–2750.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Ghazalee bin Kassim & Ors v PP and other appeals [2008] 3 MLJ 473; [2009] 1 LNS 447, CA (refd)

Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Teay Wah Cheong v PP [1964] MLJ 21; [1963] 1 LNS 142, HC (refd)

Legislation referred to

Criminal Procedure Code s 399
Evidence Act 1952 s 114(g)
Penal Code s 300

Mohd Najmi bin Daud (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Ahmad Nizam bin Abd Hamid (Rozilan bin Abd Rahman with him) (Sazali & Lim) for the accused.

Akhtar Tahir JC:

[1] The charge against the accused was as follows:

> Pertuduhan:
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> Bahawa kamu pada 2hb September 2006 jam lebih kurang 4.30 petang, di kawasan Jalan Pintas antara Simpang Jengka 5 ke Kuala Sentul, Sungai Jerik, di dalam Daerah Maran, di dalam Negeri Pahang, telah melakukan kesalahan bunuh menyebabkan kematian ke atas NORAINI BINTI UMAR (K/P NO: 900829-06-5716), dengan cara menikam lalu menyebabkan kematian. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] On 2 September 2006, four friends Mohd Rashdan bin Nit @ Abdullah ('SP4'), Norafizah bt Muhammad ('SP5'), Muzalifah bt Khamis ('SP6') and Noraini ('the deceased') decided to go for a swim at the river at Kuala Sentul.

[3] They went on two separate motorcycles one ridden by SP4 and SP5 the other ridden by the deceased an SP6. They arrived at the river at 3.20pm and stayed there until 4pm. Earlier SP6 had telephoned other friends, and amongst others the accused to follow them but the accused and others had refused.

[4] At 4pm all four decided to leave the place, again on separate motorcycles as before. On the way home SP4 and SP5 decided to have a drink whereas the deceased and SP6 proceeded ahead.

According to SP6 while they were on the road they saw the accused and his friend by the name of Along ('SP8') on another motorcycle. The accused who was riding the motorcycle chased them and SP6 then felt someone kicking her motorcycle causing both her and the deceased to fall off.

[5] They were then confronted by the accused while SP8 went off from the place. There was an argument the subject being the relationship between the accused, the deceased and SP6. SP6 wanted the accused to choose between her and the deceased whereby the accused said he wanted both of them and at the same time accusing them of being unfaithful to him.

[6] The accused then took out a knife saying that he wanted to kill both of them. SP6 and the deceased both ran with the accused chasing after them. SP6 was running in front whereas the deceased was at the back. When SP6 turned back she saw the accused pouncing on the deceased and hugging the deceased from the back.

[7] That was the last she saw of the incident as she fled and hid herself and when she came out from hiding she sat the deceased lying sprawled on the road with bleeding and almost lifeless.

[8] The deceased was taken to the hospital where apparently she died. There is no evidence to show where the deceased died and the police officer who brought the deceased to the doctor and identified by the doctor conducting the post mortem to be DSP Sharifuddin was not called as a witness.

[9] The doctor who conducted the post mortem on the deceased Dr Zahari bin Noor ('SP7') detected 18 injuries on the deceased but confirmed that the cause of death were the two stab wound on the neck.

[10] The investigating officer ('IO') of this case SP9 testified that a knife was recovered in this case and the knife and items of clothing of the accused were sent to the chemist for analysis. However in this case none of the items sent were tendered as evidence although the DPP attempted to produce the chemist report through the IO.

[11] I disallowed the DPP's application as the provision of s 399 of the Criminal Procedure Code (CPC) was not complied with. The DPP failed to prove that the chemist report was served on the accused as is required under s 399 of CPC which provides as follows:

> 399 Reports of certain person
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> (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness —
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> (a) by the Court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
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> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less that ten clear days before the commencement of the trial.

DIRECT/CIRCUMSTANTIAL EVIDENCE

[12] The direct evidence in this case ended when SP6 saw the accused pouncing on the deceased, the material evidence missing here is whether when he pounced the knife was still in his hand. After seeing the accused pouncing on the deceased neither SP6 nor any other witnesses saw the actual incident which led to the 18 injuries on the deceased.

[13] Is this sufficient to draw an inference that the accused killed the deceased bearing in mind the provisions of s 300 of the Penal Code? Section 300 Penal Code which defines murder reads as follows:

> 300 Murder
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> Except in the cases hereinafter excepted, culpable homicide is murder —
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> (a) If the act by which the death is caused is done with the intention of causing death;
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> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[14] From the reading of this provision it is clear that to constitute murder the intention or knowledge that the act will lead to the death is necessary. To me in order to determine intention or knowledge there must be some evidence to show how the said act leading to the death took place. Here there is total absence of evidence as to how the act took place and whether it was the accused who actually committed the act.

[15] Apart from the provision of law guidelines to evaluate circumstantial evidence can be gleaned from the celebrated case of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171 where it was decided as follows:

It was also contended that the learned trial judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:

> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — 'What it an accident?'.

The second passage is as follows:

> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?

The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.

In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

There are other grounds of appeal on which the appellant relied and which were discussed during the argument before this court. In our opinion there is no substance in any of them.

Although Jenny's body has never been found, there is overwhelming evidence on the record that the appellant murdered her. In our judgment no miscarriage of justice has occurred in this case.

[16] Looking at the provision of the law and evaluation of circumstantial evidence, I cannot say for certain that the cumulative circumstances of the case pointed to the accused having committed the crime.

[17] I say this because one fact which is glaring from the evidence of the doctor SP7 is that the deceased suffered 18 injuries. This to me gives rise to the inference that the deceased could have suffered these injuries while struggling or even fighting back. This leads to the possibility that she could have been accidentally or unintentionally stabbed by the accused if at all it was the accused who stabbed her.

[18] It is my finding that in this case the circumstantial evidence does not lead to the irresistible conclusion that it was the accused who murdered the deceased.

NON-PRODUCTION OF WEAPON USED

[19] The weakness of the circumstantial evidence in this case is further compounded by the fact that the weapon used for the commission of the offence was not tendered as evidence. There was the evidence of the IO that a knife was recovered but no further evidence was led to determine to establish whether this was the knife which caused the death of the deceased.

[20] The evidence of the IO seem to indicate that the knife was recovered with the assistance of the accused but again the IO stated that he and his personnel had to search for the exact location of the knife. It is clear from the evidence that the exact location of the knife was not shown by the accused. Further the photographs clearly show although this was denied by the IO that the knife had to be dug out from under the sand. If the knife was hidden under the sand there is no evidence to show what led the police to dig that particular spot.

FAILURE TO CALL THE CHEMIST

[21] More telling in this case is that the doctor conducting the post mortem had handed a number of samples to be analysed and the IO himself had seized certain items from the accused which were in fact sent to the Chemist Department yet the chemist who analysed the exhibits was not called to testify and neither was there proof that the chemist report was served on the accused.

[22] I did not hesitate in this case in invoking an adverse inference against the prosecution under s 114(g) of the Evidence Act. In doing so I took heed of what was stated in the Federal Court case of *Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals* [2008] 3 MLJ 473; [2009] 1 LNS 447 where it was stated as follows:

> The court will only invoke s 114(g) of the Evidence Act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favor of the accused. The prosecution can also in the alternative, offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s 114(g) of the Evidence Act may be invoked by the court.

[23] In this case the prosecution failed to explain the non-calling of the chemist and surely the chemist being a government servant should be easily available to testify. The prosecution might not necessarily be suppressing or withholding evidence unfavorable to them but in the circumstances of this case where the prosecution was relying on circumstantial evidence the chemist had to be regarded as a material witness.

FAILURE TO IDENTIFY THE DECEASED

[24] The final nail in the prosecution's case in this case was the failure to call the witness who identified the deceased to the doctor who conducted the post mortem. The IO testified that it was the deceased's father who identified the deceased. The father of the deceased was neither called nor offered to the defence.

[25] On identification of the deceased, Hashim J in the case of *Teay Wah Cheong v Public Prosecutor* [1964] MLJ 21; [1963] 1 LNS 142 stated thus:

> (a) The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to the hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam's name. The medical officer stated, inter alia, that the 'patient died at 10.30am the same day' and 'I handed the deceased to his relative on same day'. In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have outed clearly that he personally saw the dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this 'relative' was. The wife of Abdul Salam simply identified her husband to the police on the same day the husband died.

[26] For all intents and purposes the identity of the deceased that is the murder victim has not been established in this case.

[27] As a final conclusion I decided that the prosecution had failed to prove a prima facie case against the accused and I discharged and acquitted the accused of the charge against him.

Accused discharged and acquitted.

Reported by Kohila Nesan